IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.644 OF 2003
IN
SUMMARY SUIT NO.1682 OF 2003

Lupin Limited Plaintiff

versus

M/s.Mahavir Sales Corporation
and others Defendants

Mr.Milind Vasudeo i/by Puranik & Co. for plaintiff

Ms.Mrudula Bhatia i/by Joseph Fernandes for defendant

CORAM : S.C.DHARMADHIKARI, J.

DATE : 27th June 2005

PC :

1. Heard Mr.Vasudeo for plaintiff and Ms.Mrudula Bhatia for all defendants.

2. The Summary Suit is filed to recover a sum of Rs.48,74,700.10 Ps. as per particulars of claim marked as Exhibit-Z to the plaint.

3. The claim arises out of a written contract as evidenced by delivery challans and invoices pursuant to which the defendants were supplied

and delivered certain products by the plaintiff. Plaintiff are in the business of manufacture and sale of pharmaceutical products. The plaintiffs state that one Lupin Laborataries Limited with whom defendant no.1 had entered into transaction in question, has now amalgamated with the plaintiffs. The name of company is now Lupin Limited. It is in these circumstances that the plaintiffs are entitled to maintain present summary suit.

4. Defendant no.1 is a partnership firm and according to the plaintiffs, defendants 2 and 3 are the partners thereof. It is registered under the Indian Partnership Act, 1932.

5. Plaintiffs contend that the purchase orders mentioned in para 6 of the plaint were duly forwarded by the defendants and in pursuance thereof, the goods were sold, supplied and delivered to the defendants under the invoices dates of which are mentioned in para 7 of the plaint.

6. It is the case of the plaintiffs that the aforesaid invoices and delivery advises were duly acknowledged and goods thereunder were accepted

without any objection to the quality, quantity or price. A credit note was already issued as set out in para 8 and part payments were made by cheques. Due adjustments have been given according to the plaintiffs, for such part payments.

7. Thereafter, further purchase orders were placed and in pursuance of those, deliveries were effected and invoices raised, as set out in para 10. Even these invoices have been accepted. The goods also have been duly received and no dispute or complaint is raised with regard to their quantity, quality or price. Further, credit notes were issued and once again part payments were made as set out in para 13 of the plaint.

8. Since the full amount was not paid, demand letters were addressed on 26th April 2001 and 5th May 2001, Defendants addressed letters referring to these demand notices and acknowledging liabilities. Copies of these letters are also annexed as exhibits to the plaint. Even thereafter there were no compliance and hence Advocate’s letter/notice dated 20th February 2002 was addressed. That notice was also received and since there was no compliance of even advocate’s

notice, that the present summary suit is filed.

9. Mr.Vasudeo's contention is that on the basis of the aforesaid, present suit is maintainable as a summary suit. The claim of the plaintiffs is not barred by limitation. He submits that all that is being contended in reply to this Summons for Judgement is that Mr.Nilesh Shah who is arrayed as defendant, is not a partner and therefore, not authorised to either sign any document or letters. The other contention raised is that there is no liability to pay interest. He invites my attention to the correspondence more particularly to the letters whereunder liability is admitted by the defendants. For all these reasons, he submits that a decree as prayed be passed.

10. Ms.Bhatia appearing for defendants, however, invites my attention to the affidavit in reply and contends that the present suit is not maintainable as a summary suit. She states that the suit is based on a running acccount and the balance at the foot of which is neither confirmed nor admitted. She submits that the suit is filed to recover amounts which are not fixed, determined and certain. According to her, merely

filing a suit on running account, does not enable parties to invoke summary procedure, as set out in Order XXXVII of the CPC, 1908. She also contends that the third defendant was not a partner nor had any authority to sign documents, letters or orders in his capacity as an employee of the firm. She submits that it has been clearly set out in correspondence that the claim is not admitted. She points out that the market at the relevant time was not favourable and according to the letters addressed by the plaintiffs they had agreed to bear any loss on account of such unfavourable conditions. She invites my attention to para 3 of a letter dated 11th July 2000. Further, she also invites my attention to the replies which are sent to the advocate's notices. She points out that in the advocate's notice factual position has been pointed out. Thereafter she takes me to the particulars of claim and states that the principal amount due according to the plaintiffs, is not substantiated by the amount of invoices. In that behalf, she invites my attention to the plaintiffs advocate's letter dated 20th February 2002 and more particularly paras 9 and 10. She submits that a summary suit would not lie for claiming an amount on a running account. For

that proposition, she relied upon a decision of this Court reported in AIR-1989-Bom-264.

11. Mr.Vasudeo and Mr.Puranik in rejoinder contend that all the pleas raised in the affidavit are after thought. They submit that the reply addressed to the advocate's notice has not been received at all. In fact, such reply was not even an enclosure to the affidavit in reply. That apart, at the end of the so called reply there are several blanks and even the signatories designation is not mentioned. It is contended by them that defendant no.3 had signed the purchase orders bearing No.534 (Exhibit-B) and 551 (Exhibit-J) for and on behalf of the firm. Therefore, he is estopped from contending that he was not a partner at the relevant time. Similarly, there is an appearance filed on behalf of firm as well as partners and the same is not filed under protest. They contend that there is no denial of liability and the letter dated 5th May 2001 duly acknowledges liability but sets out several reasons for non payment in time.

12. With the assistance of learned advocates appearing for both sides I have perused the plaint and the affidavit in reply. This is a

case where the predecessor-in-title of the plaintiffs had in fact sold, supplied and delivered certain goods to the defendants. The details of purchase orders and invoices are mentioned in the plaint. Thereafter, part payments have been made. It is a case where the plaintiff's claim appears to have been admitted and therefore, part payments were made. It cannot be said to be a suit based on a running account. On the other hand, this is a suit where the written contract based upon documents exhibited to the plaint is the basis of the summary suit. Although, it is pointed out that the amount claimed is not due or in any event certain and determined as accounts have to be reconciled, my suggestion to have the proceedings referred to either a Mediator or Arbitrator for reconciling accounts and determining the sum as due and payable, is not acceptable.

13. Ms.Bhatia's contention on the basis of reading of letter dated 26th April 2001 is that the amount shown as due and payable in the account maintained by the plaintiffs, is not acceptable to defendants and this has been clearly pointed out in these letters. Records of the defendants were seized by the Excise

Vigilance Department in various raids. Therefore, defendants asked for statements of account for the period 1st April 2000 to 31st March 2001; alternatively details of bills of Rs.26,38,168/-. It is contended that after the said figure is verified-with with whatever record is available with the defendants office and reconciliation is done, that the bills could be said to be finally settled. According to Ms.Bhatia this cannot be construed as an admission of liability. Similarly, according to her, these are the contents of letter dated 5th May 2001. She submits that even amount of Rs.15.00 lakh and odd shown as due and payable therein is also not an admitted sum.

14. The decision of this Court reported in AIR-1989-Bom-264 was rendered in the peculiar facts and circumstancfes where the under-writers liability under under-writing contract was sought to be enforced. It is in that context that this Court held that terms of under-writing contract being peculiar, it will not be possible to hold that a contingent liability arising thereunder could be enforced by taking recourse to Order XXXVII of CPC.. In the peculiar facts set out in this decision that this Court construed the term

"liquidated payments". In the present case, what is sought to be recovered is a claim arising out of a written contract for supply of goods sold and delivered and evidenced clearly by invoices and delivery challans. This is not a case where the liability could be said to be contingent upon certain events. On the other hand, all that is being raised as a dispute to the claim in the suit, is that a full reconciliation of the accounts has not been done. That plea is not to be equated with the case of a suit based on running account. The plaint averments and more particularly those referred to above have not been specifically denied. On the other hand, what is sought to be urged is that the figures in the account maintained by the plaintiff are disputed in the absence of records being available with the defendants. Pertinently, there is no denial of the part payments also.

15. The defence raised cannot be said to be substantial. However, with a view to enable the defendants to prove their case that the accounts have not been fully reconciled, interest of justice would be served if conditional leave to defend is granted. Accordingly, following order.

16. ORDER :- A) On the defendants depositing a sum of Rs.20.00 lakh in this Court within a period of 16 weeks from today, the suit shall stand transferred to the list of commercial causes with usual directions to file written statement, discovery and inspection.

B) Needless to state that if the amount is not deposited within the time stipulated above, further consequences in law would follow.

16. Summons for Judgement is disposed off in the above terms with no order as to costs. Liberty is reserved to the plaintiffs, in case deposit is made, to apply for withdrawal of the aforesaid amount. Such an application would be considered on it’/s own merits and in accordance with law.

(S.C.DHARMADHIKARI, J.)